

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002**

**(202) 565-5330
(202) 565-5325 (FAX)**



'Notice: This is an electronic bench opinion which has not been verified as official'

Date: 08/23/99

Case No.: **1999 INA 159**

In the Matter of:

BEST SPORTS CAR SERVICE, INC., Employer,

on behalf of

NESTOR GONZALEZ, Alien

Certifying Officer: Hon. John Castellani, Region II

Appearance: Rev. Robert Vitaglione, of Brooklyn, New York, Agent for Employer and Alien.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that BEST SPORTS CAR SERVICE, INC., ("Employer") filed on behalf of NESTOR GONZALEZ ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible for labor certification unless the

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.²

STATEMENT OF THE CASE

On January 22, 1996, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Mechanic" in its Auto Service Center. The position was classified as an "Auto Mechanic" under DOT Occupational Code No. 620.261-010.³ Employer described the Job Duties as follows:

Auto and Diesel Mechanic-repairs and rebuilds auto & diesel engines and operating systems, including auto electric windows, doors and temperature control systems. Uses torque wrenches, spanners and volt-ohmmeters.

AF 15, box 13.⁴ The Employer's educational requirement was high school graduation. It did not specify Other Special Requirements or Training, but the Employer required two years' Experience in the Job Offered. *Id.*, box 14. This was a forty hour a week job from 7:00 AM to 3:00 PM, with

²Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

³620.261-010 **AUTOMOBILE MECHANIC (automotive ser.) alternate titles: garage mechanic.** Repairs and overhauls automobiles, buses, trucks, and other automotive vehicles; Examines vehicle and discusses with customer or AUTOMOBILE-REPAIR-SERVICE ESTIMATOR (automotive ser.); AUTOMOBILE TESTER (automotive ser.); or BUS INSPECTOR (automotive ser.) nature and extent of damage or malfunction. Plans work procedure, using charts, technical manuals, and experience. Raises vehicle, using hydraulic jack or hoist, to gain access to mechanical units bolted to underside of vehicle. Removes units, such as engine, transmission, or differential, using wrenches and hoist. Disassembles unit and inspects parts for wear, using micrometers, calipers, and thickness gauges. Repairs or replaces parts, such as pistons, rods, gears, valves, and bearings, using mechanic's handtools. Overhauls or replaces carburetors, blowers, generators, distributors, starters, and pumps. Rebuilds parts, such as crankshafts and cylinder blocks, using lathes, shapers, drill presses, and welding equipment. Rewires ignition system, lights, and instrument panel. Relines and adjusts brakes, aligns front end, repairs or replaces shock absorbers, and solders leaks in radiator. Mends damaged body and fenders by hammering out or filling in dents and welding broken parts. Replaces and adjusts headlights, and installs and repairs accessories, such as radios, heaters, mirrors, and windshield wipers. May be designated according to specialty as Automobile Mechanic, Motor (automotive ser.); Bus Mechanic (automotive ser.); Differential Repairer (automotive ser.); Engine-Repair Mechanic, Bus (automotive ser.); Foreign-Car Mechanic (automotive ser.); Truck Mechanic (automotive ser.). May be designated: Compressor Mechanic, Bus (automotive ser.); Drive-Shaft-And-Steering-Post Repairer (automotive ser.); Engine-Head Repairer (automotive ser.); Motor Assembler (automotive ser.).
GOE: 05.05.09 STRENGTH: M GED: R4 M3 L3 SVP: 7 DLU: 77.

⁴ A national of Peru, the Alien was born 1952 and graduated high school in 1970. He attended a technical school to learn the work of a diesel mechanic from April 1984 to December 1985. He was living and working in the United States under a B-2 visa at the time of application. The Alien worked as a mechanic for an express company in Peru from January 1986 to March 1991. He worked in the Job Offered from September 1994 to the date of application.

no provision for overtime at an hourly rate of \$18.70. *Id.*, boxes 10 -12.

Notice of Findings. On June 9, 1998, the Certifying Officer ("CO") issued a Notice of Findings ("NOF"), proposing to deny certification. AF 20.. Explaining that the combination of job duties of auto mechanic and diesel mechanic are not normally combined, the CO found the Employer's combination of duties to be unduly restrictive. The CO further found that the Employer's supporting documentation failed to establish the business necessity of its combination of duties because the

Rebuttal evidence must document that it is necessary for employer to have one worker perform the combination of duties in the context of the employer's business. Employer must show that it is not practical to hire two or more workers; and/or that reasonable solution such as part-time workers, new equipment, and company reorganization are not feasible.

(Copied verbatim without change or correction.) The CO also said Employer must submit either documentation establishing that the job existed before the Alien was hired or that a major change in its business operation occurred, which caused the job to be created. The CO said documentation sufficient to establish that the job existed before the alien was hired must include, but was not limited to position descriptions, organizational charts, payroll records, and the resumes of former incumbents to show that the position and its present requirements existed before the Employer hired the Alien.

Rebuttal and Final Determination. On July 15, 1998, the Employer submitted a rebuttal that consisted of a one sentence statement by its Agent, who said that its business was small and that its owner was "unable to pay two separate mechanics to do these jobs and has always had one and the same mechanic to attend to both types of engine repairs." Employer did not include any of the supporting documentation that the CO requested in the NOF. The CO denied certification on July 23, 1998, in a Final Determination. The CO reviewed the NOF and rebuttal and again explained that the Job Requirements of the position, as stated in the Application, were unduly restrictive because of the combination of duties, whose business necessity had not been demonstrated. The CO explained, .

Rebuttal evidence was required to document that it is necessary for the employer to have one worker perform the combination of duties in the context of the employer's business. Employer was required to show that it was not practical to hire two or more workers; and/or that reasonable solutions such as part-time workers, new equipment, and company reorganization are not feasible. In addition, if employer were to show the combination is justified by business necessity, employer was required to show that its requirement for each position are not unduly restrictive and the job as currently described existed before the alien was hired. Your rebuttal was to prove that the job existed and was previously filled with the same job duties and requirements before the alien was hired.

As the statement by the Agent failed to document the business necessity for the Employer's combination of duties and neither amended nor deleted this unduly restrictive requirement, certification was denied. AF 22. On September 8, 1998, the Employer requested judicial/administrative review by BALCA. AF 24.

DISCUSSION

Unduly restrictive job requirements. 20 CFR 656.21(b)(2)(C) disallows the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or not included in the Dictionary of Occupational Titles unless the employer establishes a business necessity for the requirement. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U. S. workers who may apply for or qualify for the job opportunity. **Venture International Associates**, 87 INA 569 (Jan. 13, 1989)(*en banc*).

Information Industries, 88 INA 082 (Feb. 9, 1989)(*en banc*), describes the criteria for proof of business necessity. Employer must show: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the restrictive requirement is essential to performing in a reasonable manner the job duties described by the employer. The business necessity for a restrictive requirement is not established where the employer fails to provide any supporting documentation. **Coker's Pedigreed Seed Co.**, 88 INA 048(*en banc*); also see **Valley Rest Nursing Homes**, 96 INA 029 (Jun. 5, 1997); **John Hancock Financial Services**, 91 INA 131 (Jun. 14, 1992);

Employer's proof. Unless the form of the evidence is specified by the regulations or by the NOF, "written assertions which are reasonably specific and indicate their sources or basis shall be considered documentation." **Gencorp**, 87 INA 659 (Jan. 13, 1988). In this case, however, the presentation of bare assertions of fact without supporting reasoning or evidence in the Employer's rebuttal was insufficient to carry its burden of proof. **Alfa Travel**, 95 INA 163 (Mar. 4, 1997).

In view of Employer's total reliance on its Agent's representations as its source of proof, the Board's holding in **Yaron Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en banc*), that a factual theory presented by the Agent or an attorney cannot serve as evidence of material facts is relevant to the arguments presented in this appeal. Moreover, the Board has consistently rejected the speculations of counsel as a basis for the assertions of employers.⁵ The exception in **Modular Container Systems, Inc.**, 89 INA 228 (July 16, 1991)(*en banc*), that an attorney may be competent to testify about matters of which he has first-hand knowledge, does not apply to counsel's remarks in this appeal, since there is no indication of such first hand knowledge in the record. As a result, in weighing the evidence of record, the Panel has applied the holding that assertions by employer's Agent do not constitute evidence

⁵See for examples **Re/Max Realty Group**, 95 INA 015 (Jul. 19, 1996); **Sarah and Norman Jaffe**, 94 INA 513 (Oct. 30, 1995); **Wong's Palace Chinese Restaurant**, 94 INA 410 (Oct. 12, 1995).

when not supported by statements of a person with knowledge of the facts.
Moda Linea, Inc., 90 INA 025(Dec. 11, 1991).⁶

Conclusion. Where the employer's response to the NOF includes no offer of evidence challenging the CO's findings in the NOF, the response of the employer is found to be an inadequate under §656.25(c)(3). Thus, denial of certification has been affirmed where the employer does no more than cite to data already in the record. **Ted Tokio Tanaka Architect**, 88 INA 334 (June 27, 1989). This Employer did not offer the documentation required by the NOF, but merely reiterated that this business was too small to pay two mechanics. Because it was unsupported by corroborating evidence, this response is inadequate.

As the CO's finding that the job requirements were unduly restrictive was supported by the evidence of record, it supported the denial of certification. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

⁶Also see **Michael S. Sussman**, 93 INA 200 (Aug. 17, 1993); **E. Davis, Inc.**, 92 INA 277 (Aug. 4, 1993); **LA Dye & Print Works, Inc.**, 91 INA 393 (May 26, 1993); **Michael J. Blake**, 91 INA 394 (May 26, 1993). Also see **Mr. and Mrs. Elias Ruiz**, 90 INA 425 Dec. 9, 1991); **D & J Finishing, Inc.**, 90 INA 446 (Nov. 4, 1991); **Personnel Service, Inc.**, 90 INA 043 (Dec. 12, 1990); **DeSoto, Inc.**, 89 INA 165 (Jun. 8, 1990); **Dr. Sayedur Rahman**, 88 INA 112 (Mar. 20, 1990)

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

